## RAHMAT MAYAH & ANOR v. ENTALANG MULA & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING
MAIRIN IDANG JC
[CIVIL APPEAL NO: KCH-12B-22-12-2013]
8 OCTOBER 2014

***ROAD TRAFFIC:*** *Negligence – Collision between motorcycle and bus – Whether first respondent turned on rear left signal light and slowed down until bus came to a complete halt when collision occurred – Whether brake mark indicated that first appellant did not pay attention and suddenly applied brake – Whether first respondent's police report preferred compared to appellants' oral testimony – Whether first appellant complied with Highway Code – Whether first appellant liable – Road Transport Act 1987, s. 68*

***ROAD TRAFFIC:*** *Negligence – Duty of following motorist – Whether motorist who is following another has a duty to take care of his own safety by not following too close – Whether collusion could not be avoided due to insufficient distance between vehicles*

***TORT:*** *Negligence – Road accident – First appellant's motorcycle collided with bus driven by first respondent – Decision of trial court – First appellant 70% liable for negligence – Whether first respondent turned on rear left signal light and slowed down until bus came to a complete halt when collision occurred – Whether brake mark indicated that first appellant did not pay attention and suddenly applied brake – Whether first respondent's police report preferred compared to appellants' oral testimony – Whether first appellant complied with Highway Code – Whether first appellant liable – Road Transport Act 1987, s. 68*

On 21 September 2009 around 4.10pm, the first appellant was riding a motorcycle together with the second appellant as a pillion rider. An accident took place when the said motorcycle collided with a bus driven by the first respondent and as a result, both the appellants were injured. The second respondent was the registered owner of the bus. The appellants filed an action in the Sessions Court and after a full trial, it was decided, *inter alia*, as follows: (i) the first appellant was 70% liable for negligence; (ii) the respondents were liable for contributory negligence and their apportionment of liability was 30%; (iii) the first appellant's claim against the respondents was allowed on a 30% basis; and (iv) the second appellant was allowed to claim 100% against both respondents. Dissatisfied, the appellants appealed to this court. It was argued, *inter alia*, that (a) the first respondent did not turn on the rear left signal light and slowed down until it came to a complete halt when the collision occurred; (b) there was contradiction in the first respondent's witness statement which stated that the collision occurred when the bus had stopped and his police report which stated that the accident occurred when the bus was slowing down; (c) the first appellant had to apply

the brake at the last minute when the bus stopped suddenly; and (d) the brake mark of 1.2 meter could not infer that the first appellant was speeding. On the quantum of damages, the appellants did not specifically challenge the award of the learned Sessions Court Judge ('SCJ') but urged this court to award 60% liability against the respondents for having stopped the bus suddenly and caused the accident. On the other hand, the respondents submitted that the accident was caused by the first appellant's negligence or at least substantially contributed to by the negligence of the first appellant in riding the motorcycle. Further, it was submitted that on the day of the incident, the first respondent had put on the signal light to stop and this was corroborated by the police report made by him. The issues that arose for consideration were (i) whether the first respondent had turned on the left rear signal light when he slowed down to stop; and (ii) whether the 1.2 meter brake mark indicated that the first appellant was not paying attention and had applied the brake at the last minute.

**Held (dismissing appeal):**

**(1)** The learned SCJ had considered the evidence of both appellants and the first respondent namely the evidence of the appellants that there was no signal and the evidence of the first respondent that he had put on the signal light as reported in the police report that he made on the same day of the accident. The first respondent's testimony of turning the left signal light and slowing down before the bus was knocked from the rear tallied with his police report. However, no police report was tendered or made by the appellants to show that the first respondent did not turn on the rear left signal light. The police report made by the first respondent should be preferred than the oral testimonies of the appellants. (paras 10 & 11)

**(2)** A motorist who is following another has a duty to take care of his own safety by not following too close. There should at least be one car's length between one car and the car in front for every ten miles an hour of the speed. The brake mark of 1.2 meter showed how close the motorcycle was to the bus. There was insufficient distance between the bus and the motorcycle to enable the first appellant to avoid the collusion. Applying Highway Code 22, at 45 mph, there should be three cars' length between the motorcycle and the bus. Thus, the implication of the brake mark of 1.2 meters was that the motorcycle was travelling too close to the bus and based on the first appellant's speed, the motorcycle ought to be well behind the bus. Since it was the first appellant's fault in following too close to the bus resulting in the unavoidable collusion, the learned SCJ was correct in finding that the first appellant was liable for the accident. (paras 12, 13 & 14)

**(3)** The learned SCJ had considered the quantum of damages according to law. Generally, an appellate court will not interfere on the apportionment of liability reached by the trial court. Therefore, this court was not persuaded to consider the award of 60% liability against the respondents and the quantum of damages awarded by the SCJ was not disturbed (*Uval & Anor v. Zainal*; refd). (paras 16 & 17)

**Case(s) referred to:**
*Bujang Mat & Anor v. Lai Tzen Hai & Anor [2004] 4 CLJ 127 HC* ***(refd)***
*Chan Loo Khee v. Lai Siew San & Ors [1971] 1 LNS 17 FC* ***(refd)***
*Chu Kim Sing & Anor v. Abd Razak Amin [1999] 4 CLJ 448 HC* ***(refd)***
*De Cotta v. Tan Hock Lee [1972] 1 LNS 27 HC* ***(refd)***
*Foo Sam Ming v. Archi Environ Partnership [2004] 1 CLJ 759 CA* ***(refd)***
*Miskinah Jaya & Ors v. Mohamed Salleh & Anor [1983] 2 CLJ 267; [1983] CLJ (Rep) 630 HC* ***(refd)***
*Murugan v. Lew Chu Cheong [1980] 1 LNS 49 FC* ***(refd)***
*Ooi Han Sun & Anor v. Bee Hua Meng [1991] 1 LNS 110 HC* ***(refd)***
*Thangachimmah & Anor v. Flower [1968] 1 LNS 159 HC* ***(refd)***
*Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC* ***(refd)***
*Uval & Anor v. Zainal [1969] 1 LNS 194 FC* ***(refd)***

**Legislation referred to:**
Road Traffic Rules 1959, r. 16(1)
Road Transport Act 1987, s. 68(3)

*For the appellants - Sarbjit Singh Khaira; M/s Khaira & Co Advocs*
*For the respondent - Desmond Sahathevan; M/s Battenberg & Talma Advocs*

*[Appeal from Sessions Court, Kuching; Summons No: KCH-53-245-9-2012]*

*Reported by Kumitha Abd Majid*

## JUDGMENT

**Mairin Idang JC:**

### Introduction

**[1]** This appeal arose from the judgment of the learned Sessions Court Judge (SCJ) delivered on the 29 November 2013 (the judgment). After reading the records of appeal, the parties' submissions and authorities cited, I delivered my decision on the 14 August 2014 on the appellants' appeal. I dismissed the said appeal and affirmed the decision of the learned Sessions Court Judge (SCJ) in respect of liability and the quantum of damages. However on interest in respect of special damages I allowed interest of 3% per annum from the date of accident to the date of judgment and on general damages I allowed interest 5% per annum from service of the writ of summons to the date of judgment. On the judgment sum, I allowed interest at 5% per annum from date of judgment to full settlement. On costs at the

court below I ordered the case to be remitted to the Sessions Court for determination of costs. I did not award any costs of this appeal as parties had mutually agreed.

**The Parties**

**[2]** The first appellant/plaintiff was the rider of motorcycle bearing Registration No. QKT 5209 (the motorcycle). The second appellant/plaintiff was the pillion rider. The first respondent/defendant was the driver of a motor vehicle bearing registration No. QKB 3956 (the bus). The second respondent/defendant was the registered owner of the bus.

**The Facts**

**[3]** I take the following summary of the facts from the judgment of the learned SCJ as well as from the pleadings of the parties. On the 21 September 2009 around 4.10pm along KM 9, Jalan Datuk Mohd Musa, Kota Samarahan a motorcycle driven by the first appellant with the second appellant as a pillion rider collided with the bus driven by the first respondent and as a result of which both the appellants were injured. The appellants had sued the defendants who had also counterclaimed against the appellants. After a full trial the learned SCJ delivered his judgment on the 29 November 2013.

**The Judgment**

**[4]** The judgment states as follows:

(1) The first plaintiff is found 70 percent liable for negligence for the accident.

(2) The defendants are liable for contributory negligence and the defendants' apportionment of liability is 30 percent.

(3) The first plaintiff's claim against the defendants is allowed on a 30 percent basis with costs.

(4) The court allowed the second plaintiff to claim 100 percent against both defendants with costs.

(5) The defendants do pay (on 100 percent basis):

(a) The first plaintiff:

(i) General damages in the sum of RM141,900;

(ii) Special damages in the sum of RM4,703;

(b) The second plaintiff:

(i) General damages in the sum of RM18,000;

(ii) Special damages in the sum of RM2,469;

(6) Interest as follows:

(a) 3% per annum on special damages;

(b) 4% per annum on general damages;

(7) The defendants' counterclaim against the first plaintiff be allowed with costs according to the apportionment of liability between the first plaintiff and the defendants.

**The Appeal**

**[5]** The appellants were dissatisfied with the decision of the learned SCJ. On the 15 May 2014 the appellants appealed:

(i) That the learned judge had erred in law and fact in finding that the appellants/plaintiffs failed to prove that the accident was wholly the fault of the first respondent.

(ii) The learned judge had erred in law and in fact and had misdirected himself when he failed to appreciate the sketch plan (exh. P2h) and evidence of the Sergeant Rahmat Ali bin Shaik Dawood (PW1).

(iii) The learned judge had erred in law and in fact and had misdirected himself when he failed to appreciate/consider that there was no evidence to support the first respondent/defendant's allegation that the bus turned on the left signal light and slowed down until the said bus came to a complete halt when the collision occurred.

(iv) The learned judge had erred in law and in fact and had misdirected himself when he failed to appreciate and/or consider the first respondent/defendant's admission that he stopped the bus at a place where there was no bus stop.

(v) The learned judge had erred in law and in fact and had misdirected himself when he failed to appreciate and/or consider the first respondent/defendant's admission that he had made a mistake to stop the bus prior to the collision.

(vi) The learned judge had erred in law and in fact and had misdirected himself when he failed to appreciate and/or consider the first respondent/defendant's admission that he caused the accident.

(vii) The learned judge had erred in law and in fact and had misdirected himself when he failed to appreciate and/or consider the first respondent/defendant's had admitted/confirmed/agreed that he had made a mistake and had caused the accident by abruptly stopping/trying to stop the bus at a place other than a bus stop.

(viii) The learned judge had erred in law and in fact and had misdirected himself in the award awarded to the plaintiffs.

(ix) That the learned judge failed to give due weight to the relevant evidence adduced and authorities cited by the appellants/plaintiffs before coming to his decision.

(x) The learned judge had erred in law and in fact and had misdirected himself in finding on the balance of probability that the first defendant (bus driver) did turn on the rear left signal light and slow down the bus before the first defendant pick and drop off his passenger.

(xi) The learned judge had erred in law and in fact and had misdirected himself in his finding of the 1.2 meter scratch and brake behind the bus.

(xii) The learned judge had erred in law and in fact and had misdirected himself on the apportionment of liability between the first appellant (first plaintiff) and the defendants.

(xiii) The learned judge had erred in law and in fact and had misdirected himself in his judgment on the defendants' counterclaim.

(xiv) The learned judge had erred in law and in fact and had misdirected himself in his award on the interest to special and general damages.

(xv) The learned judge had erred in law and in fact and had misdirected himself on the issue of costs.

**The Parties' Submissions**

**[6]** It is the appellants' contention that the first respondent's conduct had caused the accident. Learned counsel for the appellants had submitted that the learned SCJ was wrong in law or in fact in assuming/deciding that the first respondent had turned on the rear signal light and slowed down the bus before he picked up and dropped off his passengers. It is learned counsel's submission that there was no evidence to support such contention since the first respondent had contradicted himself by saying in his witness's statement that the said collision occurred when the bus had stopped whereas in his police report he had said the accident occurred when the bus was slowing down. It was also learned counsel's contention that the first respondent's story of having turned on the rear signal light should not be believed as he was being untruthful just like his lies on making the ten trips per day for the purpose of picking up and dropping off passengers from the Open Air Market Kuching to Kota Samarahan ferry point and back to Open Air Market Kuching; that the first respondent was also being unethical by stopping not on assigned bus stops which he had admitted to the investigating officer was a mistake which had caused the accident and the fact that the investigation officer had recommended that the first respondent be charged under r. 16(1) LN 166/59. It is also learned counsel's submission that the learned SCJ was wrong in law or in fact in his finding that the 1.2 meter brake mark showed

that the first appellant was not paying attention to the traffic in front of him and that the first appellant had only applied the brake at the last minute. Learned counsel's contention was that the brake mark of 1.2 meter would indicate that there was a sudden stop by the bus thus the first appellant had to make a sudden stop therefore the 1.2 meter brake mark could not infer that the first appellant was speeding and neither that the first appellant was not paying attention. On the first appellant not having a valid driving licence, learned counsel submitted that in law this does not make the first appellant negligent. Learned counsel had referred to *Thangachimmah & Anor v. Flower* [1968] 1 LNS 159; [1968] 2 MLJ 248 (speeding to be inferred from the brake mark) and *Chu Kim Sing & Anor v. Abd Razak Amin* [1999] 4 CLJ 448; [1999] 6 MLJ 433 (not having valid licence without road tax and insurance did not make motorcyclist negligent.

**[7]** Learned counsel for the respondents' submitted that the said accident was caused solely by the negligence of the first appellant or at least substantially contributed to by the negligence of the first appellant in riding and/or management of the motorcycle. It is the contention of learned counsel for the respondents that on liability there are three areas of contention: Whether the road was *gazetted* at the time of the accident; whether the said bus had turned on its left signal light prior to slowing down and stopping and whether the bus suddenly came to stop or whether it had been stationary for a space of time before the accident.

**[8]** On using the road which had not been *gazetted*, learned counsel for the respondents submitted that this was unfounded, baseless and non-starter as the road was already open for public used. On whether the signal light was put on or not learned counsel for the respondents submitted that the first respondent had put on the signal and this was corroborated by the police report made by the first respondent on the same day of the accident. On whether the collision occurred when the bus had stopped suddenly or when stationary learned counsel submitted that the first respondent had put on the signal light to stop, the accident therefore occurred when the bus had stopped and stationary.

**Analysis**

**[9]** I think this appeal can be disposed of by considering two issues, whether the first respondent had turned on the bus' left rear signal light (the signal) when slowing down to stop and whether 1.2 meter brake mark indicated that the first appellant was not paying attention and had applied the brake at the last minute. Now the appellants said they did not see the signal being turned on by the first respondent to slow down. My task is to sieve through the evidence on whose story is to be believed. It is here that I am reminded of the case of *Murugan v. Lew Chu Cheong* [1980] 1 LNS 49; [1980] 2 MLJ 139 (FC) which was quoted by learned counsel for the appellants that: "As a rule, the appellate court is generally reluctant to interfere with the

decision of the court at first instance unless the decision of the latter is clearly wrong in law or in fact, on a review of the evidence by the appellate court or where the latter has misdirected itself".

**[10]** Since this case involved the signal light and driving behind a vehicle I should reproduce Highway Code 16 and 22 and what they have to say on Driver's Signals and the Following Distance. Now the Highway Code is prepared by the Minister under s. 68 of the Road Transport Act 1987 and s. 68(3) enacts that a failure on the part of any person to observe any provisions of the Highway Code shall not itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings, whether civil or criminal, be relied on by any party to the proceedings **as tending to establish or to negative any liability which is in question in those proceedings**: *Chu Kim Sing & Anor v. Abd Razak Amin* [1999] 4 CLJ 448; [1999] 6 MLJ 433. (emphasis added)

Highway Code 16-Drivers' Signals

> Every time you intend to turn, stop or slow down, you should, if there is other traffic in the vicinity, give the correct signal. Signal in good time and maintain the signal for sufficient time to enable others to understand what you intend to do. Hand signals are given not only for the benefit of following traffics but also for oncoming traffics, traffics waiting in side streets, and pedestrians. The majority of cars today are equipped with signalling devices for use instead of hand signals, but in broad daylight hand signalling is more readily seen and understood. Do not allow passengers to give hand signals, and see that children do not hold their arms or dangle toys, out of windows; they must be mistaken for driving signals.

Highway Code 22- Following Distance.

> **If you collide with the rear of a vehicle in front of you it is your own fault and means that you have followed too closely**. You should allow at least one car's length between your car and the car in front for every ten miles an hour of your speed. Thus at 30 M.P.H. there should be at least three cars' length between your car and the car in front. (Emphasis added).

**[11]** Let us now go through the grounds of decision. Let us look at the first issue whether the first respondent had turned on the signal light. The learned SCJ made a finding on a balance of probability the first respondent had put on the signal and had slowed down the bus before picking up and dropping passengers (p. 2 line 30-35). In arriving at such a finding the learned SCJ had considered the evidence of both the appellants and the first respondent namely the evidence of the appellants that there was no signal and the evidence of the first respondent that he did put on the signal light which he had reported in the police report that he made on the same day of the

accident. The learned SCJ had this to say on the evidence of the first respondent "His testimony (first respondent) of turning the left signal light and slowing down before the bus was knocked from the rear tally with his police report in exh. D1. Although both the plaintiffs (appellants) said that the bus did not turn on the left signal light, there was no police report tendered or made by both the plaintiffs to show that both of them see that the defendant did not turn on the bus rear left signal light." (See p. 2 line 21-28 grounds of decision in the supplementary appeal records). The cases of *Foo Sam Ming v. Archi Environ Partnership* [2004] 1 CLJ 759 and *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229 as cited by learned counsel for the appellants would support the finding of the learned SCJ namely the courts prefer the contemporaneous documents/documentary evidence than oral evidence. To me the police report made by the first respondent on the day of the accident should be preferred than the oral testimonies of the appellants.

**[12]** On the second issue of the 1.2 meter brake mark. This is what the learned SCJ said: "As regards the 1.2 meter scratch and brake mark behind the bus, court made a finding that the plaintiff (PW2) was not paying full attention to the traffic in front of him and it is probable that he only applied his brakes at the last minute when he was too near to the said bus." (See line 37-40 p. 2 and line 1-5 p. 3 grounds of decision p. 1 of the supplementary record of appeal). Learned counsel for the appellants on the other hand had submitted that speeding could be inferred from the brake mark (See *Thangachimmah & Anor v. Flower* [1968] 1 LNS 159; [1968] 2 MLJ 248). But to me the brake mark could also infer how close the motorcycle was to the bus therefore there was insufficient distance between the bus and the motorcycle to enable the first appellant to avoid the collusion.

**[13]** Highway Code 22 says that if you collide with the rear of a vehicle in front of you it is your own fault and means that you have followed too closely. The said Code also says you should allow at least one car's length between your car and the car in front for every ten miles an hour of your speed. Thus at 30 MPH there should be at least three cars' length between your car and the car in front. In the present appeal the appellants testified that they were travelling at a speed of 45 km/h (NOP 9 September 2013, pp. 24-25). Applying Highway Code 22 at 30 MPH there should be three cars length between the motorcycle and the bus. Thus to me the brake mark of 1.2 meter would tell a different story. Certainly it does not say that the motorcycle was not going fast. The implication of the brake mark of 1.2 meters was that the motorcycle was driven too close to the bus and when driven at the speed of 45 km/h (NOP 9 September 2013, pp. 24-25) the motorcycle ought to be well behind the bus. Had this been done by the first

appellant the collusion would not have happened. As it was the first appellant was at fault for following too close to the bus resulting in the unavoidable collision. I find that the learned SCJ was correct in his finding that the first appellant was liable for the accident.

**[14]** It had also been held in several cases that a following driver should allow at least one car's length between his car and the vehicle in front for every ten miles per hour of its speed and according to *Bingham's Motor Claims Cases*, the distance should be double in the case of a two-wheel vehicle (See *De Cotta v. Tan Hock Lee* [1972] 1 LNS 27; [1972] 2 MLJ 173). A motorist who is following another has a duty to take care of his own safety by not following too close. Following the bus driven by the first defendant too closely at a speed which was not safe to do so and which prevented him from taking the necessary evasive action after the situation of danger created by the first defendant by suddenly stopping the bus (See *Bujang Mat & Anor v. Lai Tzen Hai & Anor* [2004] 4 CLJ 127; [2004] 6 MLJ 376) it behoves him to drive within limits of his vision subject of course to the caveats placed on other motorists in front of him stopping abruptly on a main highway (See *Chan Loo Khee v. Lai Siew San & Ors* [1971] 1 LNS 17; [1971] 1 MLJ 253 and *Miskinah Jaya & Ors v. Mohamed Salleh & Anor* [1983] 2 CLJ 267; [1983] CLJ (Rep) 630; [1984] 1 MLJ 187). The defendant should have been driving a good three car lengths behind the taxi and at 40 to 50 km/h the defendant was already travelling at 37 to 46 ft/s, and a collision would have been unavoidable (See *Ooi Han Sun & Anor v. Bee Hua Meng* [1991] 1 LNS 110; [1991] 3 MLJ 219).

**[15]** Now had there been an appeal by the respondents on liability, I probably would have been persuaded to allow their appeal because I do think that the first appellant was solely responsible for the accident. I think the first appellant was too close to the bus and at the speed of 45 km/h he was unable to stop and avoid colliding onto the bus. The brake mark of 1.2 meter was of no help to explain that there was no signal when the bus was about to slow down because the first appellant should have been well behind the bus (a good three car lengths) at a speed of 45 km/h. However since I was only dealing with the appellants' appeal I find that the learned SCJ had not erred in law and/or fact in his finding of liability as per his judgment delivered on the 29 November 2013.

**[16]** On the quantum of damages, learned counsel for the appellants had not specifically challenged the award of the learned SCJ but I was urged to award 60% liability against the respondents for having stopped the bus suddenly citing *Bujang Mat & Anor v. Lai Tzen Hai & Anor* [2004] 4 CLJ 127. However, to accede to the appellants' urging on 60% liability would be inconsistent with the finding of the learned SCJ that the signal was put on by the first respondent and that the bus was slowing down but the first appellant was driving at 45 km/h, was too close to the bus, was not paying

attention and that he only applied his brake at the last minute. Moreover it is also my view that the learned SCJ had considered the quantum of damages according to law and had referred to the following cases: *Lim Yoong Ling v. Enid Yoong Nyuk Yoon* [2013] 1 PIR [9], *Mohamad Hanafi Muajir v. Gan Bee Choo & Anor* [2012] 2 PIR [18], *Mohd Fairuz Janhuri v. Jiang Chao & Ors* [2011] 2 PIR [23], *Novin Raj Gunasegaran & Anor v. Sarasvati Ellangkoban* [2011] 1 PIR [20], *Brabagaran Kumarabial & Anor v. Joffrin Awang* [2013] 2 PIR [44], *Mohd Azhar Abdull Rahman v. Nadason Nagappen* [2012] 1 PIR [60] and *Paramasivan Savy Peruman v. Ibrahim Mohd Amin & Anor* [2008] 2 PIR [10].

**[17]** I am reminded that generally an appellate court will not interfere on the apportionment of liability reached by the trial court (See *Uval & Anor v. Zainal* [1969] 1 LNS 194; [1970] 1 MLJ 74 (FC) therefore I am not persuaded to consider the award of 60% liability against the respondents neither will I disturb the quantum of damages as awarded by the learned SCJ.